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Beverly L. Smith

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ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

BILLY J. OETH,)
)
 Appellant-Defendant,)
)
 vs.) No. 65A01-0712-CR-586
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE POSEY SUPERIOR COURT
The Honorable S. Brent Almon, Judge
Cause No. 65D01-0004-CF-194

July 30, 2008

KIRSCH, Judge

Billy J. Oeth, appeals the trial court's denial of his motion for sentence modification.

Oeth raises the following restated issues:

- I. Whether the trial court erred by denying the motion for sentence modification without an evidentiary hearing; and
- II. Whether Indiana's Sentence Modification Statute, IC 35-38-1-17, is unconstitutional because it violates the separation of powers doctrine by requiring prosecutorial approval before a trial court may modify a sentence.

We affirm.

FACTS AND PROCEDURAL HISTORY

In 2002, Oeth was convicted of attempted rape¹ as a Class A felony, criminal deviate conduct² as a Class A felony, aggravated battery³ as a Class B felony, and battery⁴ as a Class C felony. The trial court sentenced Oeth to sentences totaling seventy years. In his direct appeal, this court affirmed Oeth's convictions for attempted rape, criminal deviate conduct, and aggravated battery, and reversed his battery conviction. *Oeth v. State*, 775 N.E.2d 696, 705 (Ind. Ct. App. 2002). In 2007, Oeth filed a motion for sentence modification. The State objected to sentence modification. The trial court held a hearing regarding multiple defense motions, including the motion for sentence modification. At the hearing, the State again objected to a sentence modification. The trial court then denied the motion for sentence modification, and Oeth now appeals.

¹ See IC 35-42-4-1(a)(1); IC 35-41-5-1.

² See IC 35-42-4-2(a)(1).

³ See IC 35-42-2-1.5.

⁴ See IC 35-42-2-1.

DISCUSSION AND DECISION

I. Failure to Hold Hearing

Oeth argues that the trial court erred when it failed to hold an evidentiary hearing prior to denying his motion for sentence modification⁵. Oeth argues that a hearing is required before a trial court renders a judgment on a motion for sentence modification. *Appellant's Br.* at 5.

The Indiana Sentence Modification Statute is codified as IC 35-38-1-17. Subsection (a) allows a trial court to modify a sentence within 365 days of the beginning of a sentence imposed upon a convicted person after a hearing is held. However, IC 35-38-1-17(b) provides:

If more than three hundred sixty-five (365) days have elapsed since the convicted person began serving the sentence and after a hearing at which the convicted person is present, the court may reduce or suspend the sentence, subject to the approval of the prosecuting attorney

The Indiana Supreme Court has held that a trial court lacks authority to modify sentences after 365-days without prosecutorial approval. *State v. Fulkrod*, 753 N.E.2d 630, 633 (Ind. 2001). Here, Oeth, was sentenced in January 2002 and did not file for sentence modification until June 2007. Oeth's motion was clearly filed more than 365 days after he began his sentence, and therefore, any motion for sentence modification was subject to prosecutorial approval. IC 35-38-1-17(b). The prosecutor objected to Oeth's motion for modification on August 20th and on September 25th. *Appellant's App.* pp 9, 25.

Consequently, once the prosecutor objected to Oeth's motion, the trial court had no authority to modify the sentence and an evidentiary hearing was not necessary.

II. Constitutionality of IC 35-38-1-17.

Oeth also argues that IC 35-38-1-17 is unconstitutional because by allowing a prosecutor to decide whether to allow a modification, the statute grants the prosecutor judicial powers, and therefore violates the separation of powers doctrine. *Appellant's Br.* at 5,6. A party challenging the constitutionality of a statute bears the burden of proof and all doubt is resolved against that party. *Manley v. State*, 868 N.E.2d 1175, 1177 (Ind. Ct. App. 2007).

This court has previously addressed this issue. In *Beanblossom v. State*, 637 N.E.2d 1345, 1348-49 (Ind. Ct. App. 1994), we held that IC 35-38-1-17 does not violate the separation of powers doctrine because a trial court does not hold an inherent judicial power to modify a sentence and, therefore, implementing this additional power subject to certain conditions does not transfer power between branches of government. Thus by imposing condition of prosecutorial approval for any sentence modification after 365 days, the statute does not take judicial power away from the trial court and grant it to the prosecutor. *Id.* at 1348. Oeth presents no argument that would cause us to reconsider the issue.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.

⁵ The hearing on September 25, 2007 concerned Oeth's motion to transport or in the alternative to permit testimony by telephone and his petition for sentence modification. The State objected to both motions, reasoning that the court lost jurisdiction 365 days after imposition of the sentence. The trial court then denied both of Oeth's motions. See *Appellant's App.* p. 9.

